

CITATION: Hunter v. BMO Trust Company, 2026 ONSC 3330
COURT FILE NO.: CV-22-00679140-00CP
DATE: 20260605

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: KENNETH GREG HUNTER, Plaintiff

AND:

BMO TRUST COMPANY and BMO INVESTORELINE INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Paul Davis*, for the plaintiff

Shane D'Souza, and Chris Puskas, for the defendants

HEARD: May 29, 2026

REASONS FOR DECISION

NATURE OF THE MOTIONS AND OVERVIEW

[1] The plaintiff, Kenneth Greg Hunter (“Hunter”) brings two motions under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”).

[2] In the first motion, Hunter seeks court approval of the settlement agreement with the defendants BMO Trust Company (“BMO Trust”) and BMO InvestoreLine Inc. (“InvestorLine”), executed in mid-June 2025 (the “Settlement Agreement”).

[3] In the second motion, Hunter seeks court approval of Class Counsel’s¹ fees, disbursements, and HST.

[4] For the reasons that follow, I grant the relief sought. I address both motions in these reasons.

¹ Class Counsel is Paliare Roland Rosenberg Rothstein LLP.

FACTS

[5] I first review the background facts to this action. I then consider the relevant evidence for both the settlement and fee approval motions.

Background facts

The basis for the action

[6] InvestorLine is a registered investment dealer which offers Registered Retirement Income Fund (“RRIF”) accounts to the public. Those RRIF accounts are structured as trusts, with BMO Trust acting as trustee.

[7] The plaintiff alleges that in certain circumstances, the defendants withhold amounts for tax that exceed the requirements of the *Income Tax Act*, R.S.C. 1985, c. 1(5th Supp.) and the *Income Tax Regulations*, C.R.C. c. 945, and, as a result, is contrary to the standard-form trust agreement governing the class members’ RRIFs. The plaintiff seeks damages for lost tax-free growth in the RRIFs of the amounts allegedly excessively withheld.

[8] The defendants calculate the withholding taxes payable based on the total amount withdrawn from the RRIF during a year (the “Policy”). The plaintiff alleges that withholding taxes should be paid based on the separate amounts withdrawn for each transaction, which would have resulted in a lower amount of funds withheld.

[9] The defendants submit that the Policy is correct. In any event, the defendants submit that the class members suffered no damages because they could have invested the tax refund from the Canada Revenue Agency (“CRA”), which arose from the Policy, in a tax-free investment vehicle such as a Tax Free Savings Account (“TFSA”).

Steps taken in the action

[10] Hunter commenced this action on March 30, 2022.

[11] A contested motion for certification was initially scheduled for October 8-9, 2024. It was subsequently adjourned to May 27-29, 2025, to be heard with the defendants’ motion for summary judgment based on a limitations defence.

[12] Between July 2023 and May 2024, the parties exchanged evidence in connection with the certification motion:

- (i) In addition to his own affidavit, the plaintiff delivered two expert reports (a primary report and reply report) from a quantification expert, Neil de Gray of KSV Advisory (“KSV”), and an expert report from a statistician, Prof. Radu Craiu of the University of Toronto.

- (ii) The defendants delivered expert evidence from Larry Andrade of Deloitte.
- (iii) On April 10-11, 2024, the parties' witnesses were cross-examined. The parties subsequently delivered answers to undertakings and questions taken under advisement.

Facts relevant to settlement approval motion

Settlement negotiations

(i) Preliminary discussions and data from the defendants

[13] Following delivery of the evidence for the certification motion, counsel discussed whether there was a prospect of resolving this action. Class Counsel indicated the defendants would need to produce data relevant to assessing the scale of potential damages for the parties to engage meaningfully in settlement discussions.

[14] In July 2024, the defendants agreed to provide such information on a without prejudice basis. In April 2026, the defendants confirmed that Class Counsel may rely on the data and reference it in these motion materials in support of settlement approval.

[15] The data provided by the defendants includes all RRIF accounts active during the period between 2014 and 2024 held at InvestorLine. While the class definition encompasses a longer period (starting before 2014 and continuing past 2024), Class Counsel determined that the data provided a reasonable basis for estimating damages because (i) accounts affected prior to 2014 would likely face significant limitations problems, and (ii) claims arising in 2025 would likely have smaller recovery, due to the nature of the damages calculation, described below.

[16] Class Counsel reviewed the damages information produced by the defendants with KSV. Class Counsel and defence counsel arranged for meetings between their respective quantification experts so that KSV could ask Deloitte questions about the damages data.

[17] While the experts reviewed the data, counsel began arm's-length negotiations about a potential structure for settlement. Those discussions continued through 2024 and into 2025, with calls and meetings as the parties continued on a parallel track towards the contested certification and summary judgment motions returnable in May 2025.

[18] The parties considered a mediation. However, the parties' experts were communicating directly about the data and alleged damages. The parties determined they were making good progress toward a resolution without the involvement of a mediator.

(ii) Estimated total damages range

[19] The defendants maintain that, if liability is found (which they deny), there are no damages because class members could have invested tax refunds in other tax-sheltered accounts such as

TFSAs. However, even if that position was not accepted, the parties agreed to a process to determine a range of damages based on the difference in investment returns between (i) what a class member would have received had the money stayed in their RRIF account, and (ii) what the class member would receive from an investment outside of their RRIF account having received a tax refund from the CRA.

[20] The parties discussed complexities of the damages calculations, which involve a number of key assumptions, including variables like how class members would have treated any tax refunds received in respect of the allegedly excessive withholding taxes, the tax rates associated with investment returns, and the number of years funds would have been invested before they needed to be used to fund a class member's retirement.

[21] Through discussions with counsel and relying on the experts' assessments based on aggregated data from the defendants, Class Counsel was satisfied that the maximum potential damages for this case would likely be in the range of \$5 million, which would have required numerous assumptions to all be accepted in the plaintiff's favour, raising a significant hurdle for damages quantification.

[22] With different assumptions taken into account (i.e., with some, but not all of the plaintiff's assumptions accepted), damages would be the range of \$1-2 million. Even that amount might have been materially less if none of the plaintiff's assumptions were accepted.

[23] It also appeared that the recovery for each class member at the end of a successful proceeding would likely be modest and would depend upon the assumptions adopted by the experts and ultimately accepted by the court. The process for such individual determinations would require several steps by KSV.

[24] Armed with information about the likely potential range of total damages for the class, counsel engaged in extensive discussions regarding the amount of an aggregate payment by the defendants to resolve the action. The parties exchanged monetary offers to settle in early 2025 and ultimately agreed to a settlement fund of \$1.95 million.

(iii) *Negotiations about distribution*

[25] In addition to quantum, counsel also negotiated extensively about the distribution of the settlement fund. Class Counsel's negotiations were grounded in how to best achieve the objectives of the CPA in the circumstances of this case. A distribution protocol resulting in payments directly to class members, while highly preferable, presented challenges which were ultimately insurmountable in the circumstances of this case. I review these challenges below.

(a) Class size and challenges identifying class members

[26] From the data produced by the defendants, KSV concluded that the process of identifying and isolating the subset of accounts that meet the class definition would involve significant manual testing of an algorithmic approach which would be complex, time-consuming, and expensive.

Without undertaking that exercise, and based on an extrapolation of the data, KSV estimates that there are approximately 1,000 to 1,500 class members represented in the data.

(b) Difficulties given the demographics of individual class members

[27] The average age of class members (dating back to 2014) is 81 years old. As a result, many class members have passed away. Moreover, roughly 1/3 of the class members' accounts with the defendants are closed.

(c) Proportionality and relatively modest individual damages range

[28] KSV completed the manual work necessary to identify and perform the damages calculation for a sample of class members consisting of the plaintiff and three other class members. To do so, KSV made assumptions on key variables including (i) how the class member would have treated any tax refunds received in respect of the allegedly excessive withholding taxes, (ii) the tax rates associated with investment returns, (iii) the number of years funds would have been invested before the class member needed to use the funds for their retirement, and (iv) the life expectancy of the class member.

[29] The sample calculations illustrate damages for individual class members ranging from \$25 to \$750, calculated for Hunter. Hunter's damages are likely anomalous because he was 54 years old when he withdrew funds from his RRIF and was subject to withholding tax. Consequently, Hunter's foregone period of tax sheltered growth is much longer than that of most RRIF holders (given their estimated average age of 81 years).

(d) Challenges with direct deposit to class member accounts

[30] A direct deposit approach would not be possible for approximately 1/3 of the class members because their accounts are closed.

[31] Even for the subset of class members with active RRIF accounts with the defendants, direct deposits proved impracticable, if not impossible. As set out in the "Representations" section of the Settlement Agreement, defence counsel advised Class Counsel that:

- (i) a direct deposit approach would not be possible without obtaining a costly advance ruling from the CRA that the settlement funds could be deposited directly into the RRIF accounts of class members without materially negative tax consequences to the class members;
- (ii) the timing to obtain such an advance tax ruling from CRA was uncertain;
- (iii) there was no assurance that the CRA would provide a favourable ruling in respect of each class member; and

- (iv) the expense to obtain an advance tax ruling was uncertain and would risk materially diminishing the total value of the settlement funds.

[32] Class Counsel and the defendants' counsel had been involved in another class action settlement, (see *MacDonald et al v. BMO Trust Company*, 2021 ONSC 3726), which still has outstanding issues related to CRA involvement.

[33] Relying on the representations of defence counsel, and informed by its own experience, Class Counsel concluded that, in the circumstances of this case, a distribution process contingent on an advance CRA ruling was uncertain and disproportionate in a settlement of this size, and the anticipated delay is unacceptable, particularly given the age of class members.

- (e) The cost of a claims-made process

[34] Class Counsel and defence counsel had extensive discussions about other potential approaches to get money to class members, including a claims-made process; however, the costs associated with such a process were likely to be higher than the amount class members would receive in settlement funds.

[35] Epiq Class Action Services Canada ("Epiq"), an experienced claims administrator, has provided an estimate that the cost of a claims-made process for this action (including notice and distribution) would be in the range of \$280,000-\$300,000 plus HST.

[36] Epiq's estimate assumes that class members have been identified and that the calculation of amounts to be paid to class members has been programmed. The expert fees required to complete those important steps would be in addition to Epiq's estimate.

[37] KSV has opined that it would likely take KSV hundreds of hours to isolate class members in the data provided by the defendants and additional time to program the quantification algorithm. Based on KSV's standard rates, Class Counsel believe that this would amount to a cost of least another \$200,000 plus HST.

[38] In addition, Epiq's estimate assumes that no withholding taxes will be required on payments to class members. A tax expert will be required to confirm whether withholding taxes are required. If withholding taxes are required, the work for an administrator would expand further, resulting in additional expenses and delays. In addition, the parties could face a similar delay with tax refunds on uncashed cheques, as are being experienced in the *MacDonald case*, delaying residual payments to the *cy-près* recipients.

[39] Taken together, Class Counsel estimate that the expense to run a claims process for class members, including any necessary expert work product, would likely be in excess of \$550,000 (for Epiq and KSV fees and HST).

[40] Given that the net balance after payment of legal fees, HST, and disbursements would be just over \$1 million, a claims-based process with a cost of \$550,000 would result in \$1 being spent for every \$1 paid to a class member.

(iv) *The defendants' position on distribution: cy-près payment*

[41] After fully exploring these issues, defence counsel advised that their clients would not agree to a settlement in which hundreds of thousands of dollars are spent on administration. The defendants maintained that a *cy-près* payment was the only realistic approach.

(v) *Hunter provides support for a cy-près settlement*

[42] Class Counsel discussed all of these matters with Hunter at length. Hunter carefully reviewed the details of the operational enhancements discussed below and provided input which is reflected in the proposed agreement. After extensive consideration, Class Counsel and Hunter formed the view that direct payments to class members is impracticable and disproportionate in the circumstances of this settlement and that a *cy-près* payment of settlement funds would likely best achieve the objectives of the CPA.

The Settlement Agreement

[43] On February 28, 2025, the parties agreed in principle to settle the action for an all-inclusive amount of \$1.95 million. In mid-June 2025, the parties executed a comprehensive settlement agreement to memorialize the proposed settlement. In accordance with the settlement agreement, the defendants consented to certification for settlement purposes only; they deny liability and the truth of the allegations.

[44] Under the proposed settlement, in exchange for a full and final release:

- (i) The defendants will pay an all-inclusive amount of \$1.95 million to establish a settlement fund.
- (ii) The following payments will be made out of the settlement fund: (a) to Class Counsel, the Class Counsel fees and disbursements in the amount approved by the Court; (b) to the Law Foundation of Ontario, the Class Proceedings Fund Statutory Levy in the amount approved by the Court; and (c) to the *cy-près* recipient(s)—i.e., charitable or not-for-profit recipient agreed to by the parties and approved by the Court—the balance of the settlement fund.

[45] In addition to negotiating the settlement fund and distribution, the parties also extensively negotiated on operational enhancements related to the issues in the action. These changes were of critical importance to Hunter.

[46] The operational enhancements ultimately agreed to are reflected in Section 7 of the Settlement Agreement. They require the defendants to:

- (i) provide certain information on the InvestorLine client website, including regarding how RRIF account holders may be able to reduce the withholding taxes on withdrawals from their RRIFs; and
- (ii) provide training for InvestorLine call centre employees, including with reference to withholding tax rules applicable to withdrawals from a RRIF.

Proposed *cy-près* recipient

[47] The parties jointly propose HelpAge Canada as the *cy-près* recipient. HelpAge Canada is a Canadian registered charity, founded in 1975, which is dedicated to improving the lives of older persons in Canada and around the world. HelpAge Canada primarily provides grants and other payments to local organizations in Canada aimed at providing benefits to older adults.

[48] Class Counsel and Hunter devoted significant time and effort to identify appropriate *cy-près* recipients. In assessing potential recipients, among other things, the parties sought to identify organizations that operate nationally, having regard to the national composition of the class. Class Counsel and Hunter also sought to benefit class members and others who are similarly situated, given the estimated average age of 81 years old.

[49] HelpAge Canada is an appropriate *cy-près* recipient in that they are national in the scope of their operations, and they are related to the issues in this action. Their use of settlement funds can reasonably be expected to benefit the class members, virtually all of whom are retirees, and those in similar circumstances to them.

Consent certification, notice, and objections

[50] On February 17, 2026, this court certified the action as a class proceeding for settlement purposes and approved the form of notice to class members of the settlement approval hearing, certification of the action, and opt-out process. Class Counsel provided the notice in accordance with the notice plan by posting on the website of Class Counsel and by placing one advertisement each in the National Post and the Globe and Mail. The newspaper notices ran on April 8, 2026.

[51] No class members have indicated an intention to opt out of the action or to object to the settlement or Class Counsel's fees.

Facts relevant to the fee approval motion

[52] In March 2022, Hunter and Class Counsel entered into a contingency fee retainer agreement under which Class Counsel would prosecute the action. In accordance with the retainer agreement, Class Counsel applied to the Class Proceedings Fund for the funding of this action. In January 2023, the Class Proceedings Committee approved funding of this action.

[53] The retainer agreement provides that, subject to court approval, Class Counsel will be paid a contingency fee out of the proceeds of a judgment or settlement of the action. Under the retainer

agreement, the contingency fee is fixed at 33% unless litigation funding is obtained. Where litigation funding is obtained, the contingency fee is fixed at 30%. The retainer agreement further provides that Class Counsel will be reimbursed for the reasonable disbursements incurred to prosecute the action.

[54] Having obtained litigation funding, the contingency fee payable to Class Counsel under the terms of the retainer agreement is 30%. Class Counsel seek approval of a contingency fee in accordance with the agreement.

[55] Class Counsel's docketed time up to April 15, 2026 is over \$500,000. Class Counsel have incurred material time since April 15, 2026 to prepare the materials for this settlement approval motion.

[56] Hunter supports Class Counsel's request to be paid the fees, disbursements and taxes for which it is seeking approval. The total disbursements for which reimbursement is sought is in the amount of \$187,881.82.

ISSUES AND THE LAW

[57] These motions raise two issues: (i) whether the Settlement Agreement should be approved and (ii) whether Class Counsel's fees and disbursements should be approved. I address each of these issues below.

Settlement approval

The applicable law

[58] Subsections 27.1(1) and (3) of the *CPA* require court approval for a settlement to be binding on a class. Approval will be granted where the court is satisfied that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) of the *CPA*.

[59] There is a “strong initial presumption of fairness” when the settlement is negotiated at arm's-length and recommended by class counsel: *Cass v. WesternOne Inc.*, 2018 ONSC 4794, at para. 89.

[60] A standard of perfection is not required or expected of a settlement. Rather, the court assesses whether the settlement falls “within a zone of reasonableness”. In that assessment, the court may consider factors including: (i) the likelihood of recovery or success, (ii) the proposed settlement terms and conditions, (iii) the amount and nature of discovery, evidence or investigation, (iv) the future expense and likely duration of litigation, (v) the recommendation of neutral parties, if any, (vi) the number of objectors and nature of objections, (vii) the presence of good faith, arm's-length bargaining and the absence of collusion, (viii) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation and information conveying to the court the dynamics of, and the position taken by the

parties during, their negotiation, and (ix) the recommendation and experience of counsel: *Cass*, at para. 85.

[61] The factors “must not be applied in a mechanical way,” and it “is not necessary for all factors to be present, nor is it necessary that the factors be given equal weight”; the circumstances of the case shape the analysis: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, 5 C.P.C. (7th) 341, at para. 33.

[62] The court must either approve or reject the settlement. It cannot direct further negotiations between the litigants: *Cass*, at para. 86. Consequently, the court should have regard to the public policy favouring settlements and consider that rejecting the proposed settlement may undermine resolution of the proceeding. In *Osmun*, Strathy J. (as he then was) held, at para. 34:

The court cannot modify the terms of a proposed settlement. The court can only approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so could de-rail the settlement negotiations. There is no obligation on parties to resume discussions and it may be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely-held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy.

Application of the law to the present case

[63] I review the relevant factors below:

(i) *The prospects and risks of the action*

[64] There are significant risks associated with the action. In particular:

- (i) Class Counsel is not aware of case law that definitively supports the plaintiff’s theory of liability (i.e., that the defendants’ Policy is contrary to the *Income Tax Act* and *Income Tax Regulations*).
- (ii) The defendants rely on a statutory bar under s. 227 (1) of the *Income Tax Act* which provides that:

No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

The defendants would rely on the reasoning in *Lewis v. Uber Canada Inc. et al*, 2023 ONSC 6190, at para. 57, aff’d 2024 ONCA 702, even though Class Counsel would submit that the *Lewis* decision is distinguishable.

- (iii) The defendants plead limitation defences (which were to be raised on the summary judgment motion). If the limitation period was held to run as of the date of the Policy (or the date of withdrawals that were subject to the Policy), many of the claims would be time-barred.
- (iv) The defendants argued that most class members (including the plaintiff) would suffer no damages because they could invest tax refunds in other tax-sheltered accounts (like TFSAs) and fully mitigate the impact of any excess withholding.
- (v) Even if damages could be calculated, the KSV model would require complex calculations for the Class in aggregate. If the court held that aggregate damages were not appropriate, calculations would have to be performed individually, becoming even more complex and costly.

Given that the recovery for each class member at the end of a successful proceeding would likely be relatively modest, costly damages calculations would risk making the claim uneconomical.

[65] Taken together, there were significant risks with respect to the merits and cost effectiveness of a class proceeding seeking damages.

(ii) *The proposed settlement terms and conditions are within the zone of reasonableness*

[66] Even if the plaintiff could overcome all of the risks set out above, and even if all of the plaintiff's assumptions were accepted, the full amount of damages would be approximately \$5 million. That range becomes much lower (\$1-2 million) if only some of the plaintiff's assumptions are accepted, or materially less if no or very few assumptions are accepted.

[67] Consequently, a settlement at 40% of maximum value, given all of the risks, represents a substantial proportion of the defendants' potential exposure. The settlement falls within the zone of reasonableness.

[68] In addition, the operational enhancements of the settlement support its reasonableness. While the proposed settlement would not require the defendants to change the Policy, the operational enhancements provide tangible results to assist RRF holders. These enhancements to the website and customer call centre will assist in addressing the mechanics and tax consequences of increased withdrawals from RRIF accounts when accountholders make decisions about such withdrawals.

(iii) *A cy-près distribution is appropriate in the unusual circumstances of this case*

(a) The applicable law

[69] Under s. 27.2(1) of the *CPA*, a *cy-près* award can be approved “if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly”. Sections 27.2(2) and (3) of the *CPA* provide:

In approving a settlement under section 27.1, the court may approve settlement terms that provide for the payment of all or part of the settlement funds to the person or entity determined under subsection (3) on a *cy-près* basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.

For the purposes of subsections (1) and (2), payment may be made on a *cy-près* basis to,

(a) a registered charity within the meaning of the *Income Tax Act* (Canada) or non-profit organization that is agreed on by the parties, if the court determines that payment of the amount to the registered charity or non-profit organization would reasonably be expected to directly or indirectly benefit the class or subclass members; or

(b) Legal Aid Ontario, in any other case.

[70] In *Serhan v. Johnson & Johnson*, 2011 ONSC 128, the plaintiffs’ claim arose from alleged defects with diabetes monitors. By the time the case was set for trial, the products had been recalled— though some class members still had not been paid back for the cost of the devices.

[71] The parties in *Serhan* negotiated a settlement valued at \$4 million, with \$2.75 million in cash and the remaining amount in free products. None of the settlement funds or free products were to be distributed directly to class members. It was therefore an entirely *cy-près* settlement. Justice Horkins approved the settlement because (i) there were significant challenges in identifying class members and distributing funds to them and (ii) the settlement would benefit Canadians with diabetes (like the class members in that case): at paras. 57-59.

[72] In *Cass*, the settlement fund was \$1 million. After payment of fees and disbursements of class counsel, approximately \$385,000 was left for class members. The evidence was that it would cost approximately \$200,000 to distribute funds to shareholders: at para. 27. The court approved a *cy-près* distribution to avoid a scenario where “more than half” of the amount would be spent on administration: at paras. 111-13.

(b) Application of the law to the facts of this case

[73] The proposed settlement contemplates a payment of the net settlement fund of over \$1 million *cy-près* to HelpAge Canada (after payments for Class Counsel fees, disbursements and the Class Proceedings Fund’s statutory levy are made). Such a process is consistent with the applicable law.

[74] I rely on the following factors:

- (i) Settlement funds cannot be directly deposited into accounts held with the defendants due to the prohibitive cost, as well as the uncertainty of the availability, merits and timing, of an advance ruling from the CRA. This settlement is therefore unlike cases where even small amounts have been provided directly to class members in accounts still held with the defendants (see *Kaplan v. PayPal CA Limited*, 2021 ONSC 1981).
- (ii) KSV advises that although the process to identify class members can be automated using an algorithmic approach to some extent, because of the nature of the data, “significant review and manual testing” would be required.
- (iii) KSV advises that it would be required to engage in a “complex multi-step process” to quantify damages for individual class members based on the inputs reflecting the circumstances of the class member. KSV describes the process as “time consuming and costly,” likely requiring “hundreds of hours of work.”
- (iv) Class Counsel anticipate that over \$550,000 would be required to administer a claims process.
- (v) KSV estimates that individual damages may range from approximately \$25 at the low end to approximately \$750 at the high end, being the plaintiff’s damages, which are atypical as he is much younger than the average class member.
- (vi) KSV advises that each class member’s financial loss “is structurally constrained in each tax year”.

[75] In the present case, there is no ability to achieve operational enhancements without a *cy-près* settlement, since the defendants will not agree to a settlement that involves a claims process. The defendants could be successful at trial, both on the principle that they acted properly, and on the many defences, including limitation periods and calculation of damages. In these circumstances, and considering the factors discussed above, the test for a *cy-près* settlement is met.

(iv) *Class Counsel recommends the settlement*

[76] Class Counsel recommends the settlement, including the *cy-près* component, after extensive negotiation and comprehensive consideration of direct distribution methods. I agree that

in the unusual facts of this case, there are no practicable alternatives to a *cy-près* distribution in a negotiated resolution and a *cy-près* distribution is consistent with this court's jurisprudence.

(v) *Hunter supports the proposed settlement*

[77] Hunter supports the proposed settlement, including the *cy-près* distribution. Hunter understands that he would likely be entitled to a payment at the upper end of the range because of his relative youth. However, such payment would be subject to all of the defences raised by the defendants, which could eviscerate all or part of his claim.

[78] Further, Hunter considers that the operational enhancements to be implemented by the defendants are a good result for the class members and supports paying the net settlement fund *cy-près* to HelpAge Canada.

(vi) *The amount and nature of discovery, evidence or investigation*

[79] Although the settlement was negotiated prior to the contested motion for certification, Class Counsel have a good understanding of the risks of the action and the potential recovery for class members. As explained above, the defendants produced data regarding all RRIF accounts for a 10-year period.

(vii) *The future expense and likely duration of litigation*

[80] This proceeding will undoubtedly be lengthy, hard fought, and expensive if the settlement is not approved. In proceedings against these same defendants, Class Counsel litigated an action for over 15 years through a contested hearing on the merits and only entered into a settlement on the eve of a contested damages reference. There is no reason to believe that this action would not be similarly hard fought.

(viii) *The presence of good faith bargaining*

[81] The parties negotiated the settlement in good faith and through extensive arm's-length discussions.

(ix) *The number and nature of objections*

[82] To date, there have been no objections to the proposed settlement.

Conclusion on settlement approval.

[83] For the reasons summarized above, I approve the proposed settlement. It is fair and reasonable and in the best interests of the class.

Fee approval

[84] I first consider the applicable law and then apply the law to the present case.

The applicable law

(i) *The test for fee approval*

[85] Section 32 of the *CPA* requires court approval of a retainer agreement between the representative plaintiff and Class Counsel and payment of Class Counsel's fees. The overriding issue in approving fees is whether they are fair and reasonable given the risks counsel assumed and the result achieved in light of the objectives of the *CPA*: *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, 359 D.L.R. (4th) 713, at para. 27.

[86] Courts have applied a presumption that the percentage fee provided in class counsel's retainer agreement with the representative plaintiff will be approved: *Cass*, at para. 127.

[87] The presumption is intended to create predictability for class counsel, which, in turn, encourages class proceedings and enhances access to justice: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at paras. 7-10.

[88] Presumptive approval recognizes that class counsel typically pursue a portfolio of cases, with some entirely unsuccessful after years and millions of dollars of invested time, some successful with substantially greater recovery than the time incurred, and others successful but with fees that do not cover the actual time incurred: *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670, 9 C.P.C. (8th) 431, at para. 11.

[89] Courts have also occasionally applied a multiplier approach to test the reasonableness of a percentage fee: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, 97 C.P.C. (6th) 169, at para. 22.

[90] Courts have accepted multipliers in excess of 7 times docketed time, described multipliers up to 4 times as "presumptively fair," and expressed the view that a multiplier of 2.5 times docketed time may be considered "low": *Helm v. Toronto Hydro*, 2012 ONSC 2602, 40 C.P.C. (7th) 310, at paras. 25-26; *Miller v. FSD Pharma, Inc.*, 2021 ONSC 911, at para. 20; *Fantl v. Transamerica Life Canada*, 83 C.P.C. (6th) 265, (Ont. S.C.) at para. 92.

Application of the law to the present case

[91] I find that Class Counsel's fee request is reasonable. I rely on the following factors:

- (i) As explained above, the proposed settlement is a good result for the class. It is a pre-certification settlement of \$1.95 million, which is approximately 40% of the high end of the estimated damages range (assuming the class succeeded at trial).

- (ii) Class Counsel rigorously explored alternatives to the *cy-près* distribution, ultimately concluding that it is reasonable given the practical obstacles to paying settlement funds directly to class members, as noted above.
- (iii) The operational enhancements provided for in the proposed settlement agreement assist class members and others who hold RRIFs with the defendants, to better understand the potential consequences of withdrawals and to direct them to sources to assist their understanding.
- (iv) This is not a straightforward claim. The action involves a complex calculation of income tax withholdings without direct legal precedent. Developing the action involved significant work. Class Counsel also worked with experts to prepare a proposed aggregate damages methodology that involved reliance on statistical evidence at certification. All of these efforts increased Class Counsel's investment in the action.
- (v) While relatively small in terms of potential damages (and, comparatively, class size), this was a complex case in which Class Counsel took on significant risk and obtained a good result for the class.
- (vi) The primary risk Class Counsel incurred was that the case would be unsuccessful and counsel would receive no compensation of any kind for their work. The risks are reflected in the fact that Class Counsel's docketed time is greater than the amount of fees sought for approval under the contingency fee retainer agreement.
- (vii) Litigation funding from the Class Proceedings Fund mitigated, to some extent, the risks assumed by Class Counsel in this case. Importantly, however, the contingency fee retainer agreement in this action expressly contemplated litigation funding and, funding having been obtained, reduced the percentage contingency fee from 33% to 30%. Class Counsel are seeking 30% per the retainer agreement which accounts for the reduction in risk resulting from litigation funding.

[92] Finally, the retainer agreement meets the requirements under s. 32(1) of the *CPA*. It is in writing and, (i) states the terms under which fees and disbursements shall be paid, (ii) gives an estimate of the expected fee, whether contingent on success in the class proceeding or not, and (iii) states the method by which payment is to be made, whether by lump sum, salary or otherwise.

[93] The disbursements sought are fair and reasonable. Disbursements incurred for the action total \$187,881.82, with a portion of those disbursements having been paid by the Class Proceedings Fund. The primary disbursements were expert fees for the certification motion. There is a detailed breakdown of the disbursements incurred in the record. The disbursements were necessary to obtain a result in the proceeding and should be approved.

Conclusion

[94] For the above reasons, I approve the retainer agreement and find that the fees and disbursements sought by Class Counsel are fair and reasonable.

ORDER

[95] For the above reasons, I grant the relief sought. Orders to go as per attached.

GLUSTEIN J.

Date: 20260605

CITATION: Hunter v. BMO Trust Company, 2026 ONSC 3330
COURT FILE NO.: CV-22-00679140-00CP
DATE: 20260605

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KENNETH GREG HUNTER

Plaintiff

AND:

BMO TRUST COMPANY and BMO
INVESTORELINE INC.

Defendants

REASONS FOR DECISION

Glustein J.

Released: June 5, 2026

2026 ONSC 3330 (CanLII)